UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 160, LOCAL LODGE 289

Cases 19-CD-502 and 19-CD-506

And

SSA MARINE, Inc.,

And

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,

INTERVENOR ILWU'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ DECISION

Intervenor International Longshore and Warehouse Union ("IL WU") respectfully submits this Brief in support of its Exceptions, concurrently filed herewith, to Administrative Law Judge William Kocol's Decision and Order in this matter.

I. <u>STIPULATED FACTS</u>

Waiving a hearing, the parties at the time¹ stipulated to the following material facts. SSA provides stevedoring (*i.e.*, cargo-handling) and related services in ports all around the world, including the Puget Sound-area marine terminals near Seattle, Washington. (Stip. p. 2, par. 5.) SSA is also an employer-member of the Pacific Maritime Association ("PMA"). (Stip. p. 3, par. 7.) For purposes of collective bargaining, the PMA "represents approximately 50 forprofit stevedore companies, marine terminal operators and maintenance contractors at waterfront facilities in Washington, Oregon, and California." (Stip. p. 3, par. 7.) The PMA is, and at all

INTERVENION II WILL PRICE IN CURPORT OF EXCEPTIONS TO ALL RESISION - D. . . .

¹ The Stipulation was prepared pending ILWU's motion to intervene. The ALJ granted ILWU's motion to intervene weeks after the Stipulation was filed in the case and only a few work days before the filing of briefs with the ALJ. It was error for the ALJ to rule on the Stipulation and without a hearing absent agreement by ILWU. Among other things, ILWU would have presented or elicited additional facts concerning the alleged indemnification agreement between SSA and PMA.

relevant times has been, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. (Stip. p. 3, par. 9.)

Prior to July 1, 2008, and pursuant to its collective bargaining agreement with the International Association of Machinists ("IAM"), SSA assigned its maintenance and repair work in the Puget Sound-area to employees represented by the IAM. (Stip. p. 4, par. 13.) However, in July 2008, the PMA "entered into a contract with the ILWU giving maintenance and repair work at all 'new' terminals to employees represented by the ILWU." (*Id.*) Pursuant to that agreement, SSA assigned the "maintenance and repair of its stevedoring and terminal service power equipment while [SSA is] present at Terminal 91 in Seattle, Washington to employees who are represented by the ILWU," rather than employees represented by the IAM. (*Id.* at p. 4, par. 13.)

On July 22, 2011, the National Labor Relations Board made a jurisdictional award of the "maintenance and repair of [SSA's] stevedoring and terminal service power equipment while present at Terminal 91 in Seattle, Washington [the "disputed work"] to employees who are represented by the ILWU."

Subsequent to that decision, the IAM refused to withdraw and disclaim its contractual pursuit of a pay-in-lieu monetary remedy with respect to the assignment of the disputed work to the ILWU. Instead, IAM continues to maintains its arbitral claims against SSA on the grounds that it will have no coercive effect on SSA because PMA would reimburse SSA for any awarded backpay under an indemnification agreement. However, under governing Board law, IAM's maintenance of its contract claims for backpay violates Section 8(b)(4)(ii)(D) of the Act, as alleged in the Complaint.

II. ARGUMENT

A. The ALJ Erred by Improperly Relying on Findings and Argument From the Underlying IAM Arbitration Later Contradicted By the Board's Section 10(k) Award.

The Board has observed many times, "It is well settled that a party to a Board 10(k) proceeding cannot relitigate the Board's work assignment in a subsequent 8(b)(4)(D) case." See,

e.g., Tile, Marble, Terrazzo Finishers And Shopworkers, Local 47-T (Grazzini Brothers & Company), 315 NLRB 520, 522 (1994) (Grazzini). The Board has further held, "It logically follows that a party cannot relitigate the various factors, including the existence or nonexistence of a collective-bargaining agreement, that the Board considers in making its 10(k) determintation." Id. Here, IAM has not only relitigated such issues, the ALJ Decision rests on findings directly contrary to those made by the Board in the underlying 10(k) case.

Even though the Board's 10(k) Award overruled IAM's contractual arbitration claim, the ALJ Decision begins with the improper adoption of findings made by the IAM arbitrator in that initial arbitration proceeding between IAM and SSA. From this faulty foundation, the ALJ Decision erroneously concludes that IAM was contractually entitled to perform the work, and that, therefore, "SSA was not an innocent bystander caught up in a dispute not of its own making between two unions; rather, it created the dispute." (ALJD 8:7-9). Such findings were not only litigated in the underlying 10(k) proceedings, the Board necessarily made contrary findings by awarding the work to ILWU-represented employees.

Of equal deficiency, the ALJ Decision goes on to assume that IAM employees are contractually entitled to perform the work and, therefore, are legally entitled to obtain a monetary remedy for the denial of such contract rights. This analytical construct patently contradicts the Board's 10(k) award, assigning the work to ILWU employees. Once the Board issues a 10(k) award, any contrary contractual claims "at that point... lacked a reasonable basis...." Local 32B-32J, Service Employees International Union, AFL-CIO (Nevins Realty Corp.), 313 NLRB 393, 402 (1993), quoting, Longshoremen ILWU Local 7 (Georgia Pacific), 291 NLRB 89, 92 (1988). Accordingly, since the IAM's contract claim for the disputed work "lacked a reasonable basis" after the contrary 10(k) award, it necessarily was legal error for the ALJ to find IAM contractually entitled to perform the work and to have a lawful objective in seeking to recover resulting lost wages for its members.

B. The ALJ Erred by Using An Incorrect Legal Standard -- Failure to Dismiss

Contract Claims After Issuance of a Contrary 10(k) Award Violates the Act Even Absent Any Additional "Coercion" Against the Employer.

The ALJ Decision rests on the faulty assumption that SSA must somehow be economically coerced or harmed by the ultimate result of a contract claim that conflicts with the Board's 10(k) award. It is well established: "Once the Board issues a 10(k) award, a respondent has a reasonable period to refrain from pursuing its conflicting grievance claim." Sheet Metal Workers International Assoc. (E.P. Donnelly, Inc.), 357 NLRB No. 131, slip op. *5 (Dec 08, 2011). Numerous Board cases establish that "a union's failure to withdraw a pending grievance or state court action to pursue a grievance after a 10(k) award has issued also violates the Act." Grazzini, 315 NLRB at fn. 9, citing, Roofers Local 30 (Gundle Lining Construction), 307 NLRB 1429, 1430-31 (1992). "The purpose of prohibiting pursuit of such claims after a 10(k) award is to prevent the undermining of the 10(k) award. Section 10(k) was included in the Act "to provide a final resolution to the dispute over which group of employees are entitled to the work at issue." Grazzini, 315 NLRB at 523, citing Roofers Local 30 (Gundle Construction), supra at 1430. The Board has long made clear that such an effort to undermine a 10(k) award constitutes an unlawful objective in violation of section 8(b)(4)(D), independent of and in addition to any resulting coercive economic impact on any employer. Longshoremen ILWU Local 32 (Weyerhaeuser Co.), 271 NLRB 739 (1984) ("As the judge found, the Respondent's actions constitute both an unlawful effort to undermine the Board's 10(k) award, which was contrary to the Respondent's interests, as well as prohibited economic coercion of Jones-Washington Stevedoring Company and the Pacific Maritime Association with an object of forcing Weyerhaeuser to assign the disputed work to its members. See Teamsters Local 85 (PMA), 224

NLRB 801 (1976).") (Emphasis added)² Thus, IAM's maintenance of its contractual claim for monetary damages violates the Act separate and apart from whether SSA would ultimately have to pay for such judgment as opposed to PMA. The ALJ Decision's failure to include this critical point requires that it be overturned and a violation found here.

C. Governing Board Law Requires the Ruling that IAM's Continuing Claim for Lost Wages after the 10(k) Award Constitutes Sufficient "Coercion" to Violate Section 8(b)(4)(D) Whether SSA or PMA Ultimately Pays the Judgment.

"It is well settled that a union's pursuit of a lawsuit or arbitration to obtain work awarded by the Board under Section 10(k) to employees represented by another union, or monetary damages in lieu of the work, has an illegal objective and violates Section 8(b)(4)(ii)(D)." Operative Plasterers Local 200 (Standard Drywall, Inc.), 357 NLRB No. 160, slip op. *3 (Dec. 30, 2011) ("SDI III")(emphasis added.). See, also, Sheet Metal Workers, Local 27 (E.P. Donnelly), 357 NLRB No. 131, slip op. at *3 (2011), and cases cited there.

As held in the above Board law, a union violates Section 8(b)(4)(D) simply by maintaining a contract or legal claim that conflicts with a 10(k) award. "Allowing the losing party to a 10(k) dispute to pursue payments for work that the Board awarded to employees other than those involved in the grievance necessarily subverts the Board's 10(k) award." Grazzini, 315 NLRB at 522-523, citing Carey v. Westinghouse, 375 U.S. 261 (1961). Since, under these cases, it matters not whether the claim ultimately succeeds, it necessarily is equally irrelevant whether SSA, as opposed to PMA, would ultimately incur such liability. The offending conduct is the prosecution of the claim itself. As noted in Service Employees International Union, AFL-

INTERVENOR ILWU'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ DECISION

² In Teamsters Local 85 (PMA), the Board held that "Respondent's grievance, which is based upon the fact that longshoremen were performing the disputed work rather than the teamsters, is in derogation of the Boadr's 10(k) determination.... In filing the grievance, Respondent was action in defiance of the 'Board's superior authority." 224 NLRB at 808.

CIO (Nevins Realty Corp.), "The clear lesson is that arbitration, under certain circumstances, constitutes a form of coercion iterdicted by Section 8(b)(4)(ii)...." 313 NLRB at 402.

Here, IAM's intended arbitration to secure lost wages against SSA constitutes such coercion. This is because, in addition to undermining the integrity of the Board's 10(k) award, prosecution of the contract claim will necessarily impose on SSA various legal fees, arbitration expenses and expenditure of time and resources to defend. Such economic harm is more than sufficient to constitute "coercion." Indeed, the Board now routinely orders an offending union to pay the employer and even harmed third parties for their legal fees incurred in defending contract or legal claims in conflict with a 10(k) award. See, e.g., SDI III, 357 NLRB No. 160, fn. 3 and fn. 15 (2011) (ordering as a remedy that respondent union reimburse the employer and the competing union for their respective legal fees and costs incurred to defend claims that conflict with a 10(k) award)

IAM's prosecution of its lost wages will also, even under the ALJ's theory, impose burdens and costs on SSA. First and foremost, the claim is solely against SSA. Thus, any adverse ruling will be against SSA, not PMA. And any award for lost wages would arise only from a ruling that SSA has violated its CBA with IAM. This alone, separate from any actual payment by SSA, constitutes coercion as a matter of law sufficient to violate Section 8(b)(4)(D). In this regard, the Board in *Sheet Metal Workers*, Local 27 (E.P. Donnelly), recently held that a claim for declaratory relief (i.e., a declaration of liability) for breach of contract constitutes coercion in violation of Section 8(b)(4)(D) even in the absence of any monetary or other relief. In overruling the ALJ's finding of an absence of coercion, the E.P. Donnelly Board held:

The judge saw "nothing improper" in the request in count one of the second amended complaint for declaratory relief validating the Aiges Award's finding that

Donnelly violated the PLA. We disagree. If granted, a declaration validating the finding that Donnelly breached the PLA by assigning the work to the Carpenters-represented employees would also directly conflict with the 10(k) award. Accordingly, we will modify the remedy to require that the Respondent withdraw its lawsuit against Donnelly in its entirety.

Donnelly 357 NLRB No. 131, slip op. *4. Likewise, here, any arbitral declaration or finding that SSA owes lost wages for failing to assign the disputed work to IAM employees necessarily and equally violates the 10(k) award, which assigned the work to ILWU employees.

Additionally, SSA would, under the ALJ's theory of indemnification, still necessarily incur costs related to the administration of the supposed indemnification agreement with PMA in the event of adverse judgment for lost wages, including as to the amount and scope of any indemnification for past and continuing, future payments. This is no different than the costs of securing reimbursement or indemnification under any commercial insurance contract, which has never been held to preclude a ULP violation.

D. Under Governing Board Law, IAM's Claim for Lost Wages Is Also Coercive As To PMA And Such Finding Does Not Deprive IAM of Due Process.

The Board has repeatedly found a violation of Section 9(b)(4)(D) in similar circumstances where the PMA (and other third party employers) would end up having to pay the lost wages claim instead of the 10(k) employer. For example, in Longshoremen ILWU Local 32 (Weyerhaeuser Co.), the Board found unlawful coercion against Weyerhaeuser, the 10(k) employer, in violation of Section 9(b)(4)(D), where the ILWU had prosecuted lost wage claims against PMA and a third party, stevedore company. 271 NLRB at 759. ("As the judge found, the Respondent's actions constitute both an unlawful effort to undermine the Board's 10(k) award,

which was contrary to the Respondent's interests, as well as prohibited economic coercion of Jones-Washington Stevedoring Company and the Pacific Maritime Association with an object of forcing Weyerhaeuser to assign the disputed work to its members.")

Likewise, in *Teamsters Local 85 (PMA)*, the Board adopted the following analysis of the ALJ:

I realize that the more typical 8(b)(4)(D) situation involves only a single employer while here, as in the typical 8(b)(4)(B) case, there are several involved. But the terms of the statute do not expressly limit 8(b)(4)(D) to cases where competing groups of employees are employed by the same employer and the Board has already heard and rejected this contention. Local Union No. 3, IBEW (Western Electric), supra. Likewise, the General Counsel is not precluded from proceeding under Section 8(b)(4)(D) because the evidence shows that Respondent acted with an object of subjecting a neutral employer to pressures designed to cause a cessation of business with the primary employer, i.e., an 8(b)(4)(B) object, for, the same set of facts may be cognizable under both Section 8(b)(4)(D) as well as 8(b)(4)(B). Local No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Arthur Venneri Co.) v. N.L.R.B., 321 F.2d 366, 371 (C.A.D.C.), cert. denied 375 U.S. 921 (1963).

224 NLRB at 807. Thus, the fact that PMA may ultimately reimburse SSA for lost wages paid to IAM-represented employees does not preclude a finding of coercion as to SSA.

Even assuming such a ruling would require a finding that IAM's wages claim is coercive as to PMA, this would not, contrary to the ALJ Decision, be outside the scope of the Complaint. The charging party in both 19-CD-502 and 19-CD-506 is SSA alone. (SF Exh. A, B). The

Board's October 31, 2011 Complaint alleges, inter alia, that IAM "has threatened, coerced, or restrained the Employer [SSA] and other persons engaged in commerce or in industries affecting commerce." (Complaint ¶ 6(c) (Stip Exh. C)). (Emphasis added.) PMA is not only such "other persons" mentioned in the Complaint. PMA is the certified bargaining agent for SSA in its relationship with the ILWU and has been found by the Board to have the authority to bind its member companies like SSA under the coast-wide labor agreement with the ILWU, even if SSA were opposed to such a decision or obligation. (See, e.g., NLRB v. Hartman, 774 F.2d 1376 (9th Cir. 1985) (partially enforcing a Board order which had concluded that an employer committed a section 8(a)(5) ULP when it refused to comply with a collective bargaining agreement negotiated by its multiemployer representative, and observing that "[a]n employer who is a member of a multi-employer bargaining association is bound by an agreement negotiated by the association.".)

Moreover, the Board has long recognized the crucial role PMA plays in maintaining peaceful labor relations between the ILWU and West Coast waterfront employers. A generation ago, in its 1938 decision that recognized the ILWU as the bargaining representative for West Coast longshore workers, Shipowners Association of the Pacific Coast, 7 NLRB 1002, the Board stated that it:

[W] as cognizant then, as it is now, that employers in the shipping industry on the Pacific Coast have a direct and vital interest in the terms and conditions of employment for longshoremen. The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship. All members of PMA have given that agency the authority to act as their agent and PMA, in turn, is clearly the agent of employers employing longshoremen. In

this particular industry the community of interest of the participating employers is unmistakable.

ILWU (California Cartage Co.), 208 NLRB 994, 997 (1974), aff'd, 515 F.2d 1018 (D.C. Cir. 1975), cert. denied, 424 U.S. 942 (1976).

Nor does a finding, that IAM's wage claim is economically coercive as to PMA, deprive IAM of due process, contrary to the ALJ Decision. As noted, the Complaint on its face alleges coercion against "the Employer and other persons." This provided IAM with clear and sufficient notice to litigate the matter. Dispelling any doubt, IAM itself raised the issue of PMA indemnification of SSA as an affirmative defense in its Answer and in these proceedings. Thus a finding that such indemnification does not preclude a violation falls well within the ambit of the legal issues litigated by the parties.

III. CONCLUSION

For the reasons stated herein and in the brief of the Acting General Counsel, IAM must be found in violation of §8(b)(4)(ii)(D).

June 12, 2012

Respectfully submitted,

LEONARD, CARDER, LLP

Attorneys For Intervenor ILWU